STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee,	UNPUBLISHED November 26, 2013
v	No. 312249 Calhoun Circuit Court
TERRELL GERMAINE McCLINTON, Defendant-Appellant.	LC No. 2011-002943-FC

Before: WHITBECK, P.J., and WILDER and RONAYNE KRAUSE, JJ.

PER CURIAM.

Defendant, Terrell Germaine McClinton, appeals as of right his conviction, following a jury trial, of second-degree murder.[1] Because the trial court did not err by failing to issue the jury instructions that McClinton requested, we affirm.

I. FACTS

A. BACKGROUND

Breyann Caldwell testified that on the evening of May 26, 2010, she and some family members were watching television in her house while Anton Sams was sitting on her porch. According to Caldwell, McClinton came to Caldwell's house and demanded that Sams return some money to him. McClinton challenged Sams to a fistfight, and McClinton and Sams went into the street in front of Caldwell's house.

Caldwell testified that both McClinton and Sams were swinging their fists without making contact until McClinton hit Sams in the face. Caldwell testified that McClinton punched Sams in the face three or four times, and Sams fell down. Devon Gibson and Paul Vasquez, neighbors who witnessed the fight, testified that McClinton hit Sams only once before he fell.

Caldwell, Gibson, and Vasquez all testified that after Sams fell, he hit his head on the ground and remained motionless. Gibson testified that McClinton looked at Sams for a few

[1] MCL 750.317.

seconds, then crouched over Sams's head and hit him four more times with heavy, forceful punches. Vasquez testified that McClinton paused a few seconds, then crouched over Sams's head and hit him five more times in the face.

Lieutenant Brian Bartzen, a firefighter, testified that when he arrived on the scene, Sams was in cardiac arrest and was not breathing. Despite efforts to resuscitate him, Sams was pronounced dead at the hospital. Dr. Joyce DeJong, a forensic pathologist, testified that Sams died from blunt force trauma to the head and neck. The prosecutor charged McClinton with open murder and, alternatively, voluntary manslaughter.

B. PROCEDURAL HISTORY

During a trial conference, the prosecutor asked the trial court to strike Latisha Freeman, Caldwell's cousin, from the witness list because he could not locate her. In response, McClinton requested that the trial court instruct the jury that it could infer that Freeman would have provided testimony unfavorable to the prosecutor. The prosecutor indicated that he made several attempts to locate Freeman over several weeks leading up to trial, including attempting to call her and issue subpoenas, checking her last known addresses, trying to contact her through relatives, and sending an internal investigator, police cadets, and a special police unit to look for her. The trial court ruled that it would not give a missing witness instruction because the prosecutor diligently attempted to produce Freeman.

McClinton also requested that the trial court instruct the jury on involuntary manslaughter. The trial court denied the request, ruling that the prosecutor had not charged McClinton with involuntary manslaughter and the additional instruction would confuse the jury. McClinton's trial counsel also requested an instruction on the defense of accident, which the trial court denied on the basis that there was no evidence to support it.

The jury found McClinton guilty of second degree murder.

II. JURY INSTRUCTIONS

A. STANDARD OF REVIEW

When reviewing a claim of instructional error, this Court views the instructions as a whole to determine whether the issues to be tried were adequately presented to the jury.[2] This Court reviews de novo questions of law, including whether an instructional error violated a defendant's due process rights under the Fourteenth Amendment.[3] This Court reviews for an abuse of discretion a trial court's decision regarding the applicability of a jury instruction to the

[2] *People v Martin*, 271 Mich App 280, 337-338; 721 NW2d 815 (2006).

[3] *People v Wilder*, 485 Mich 35, 40; 780 NW2d 265 (2010).

facts of a specific case.[4] The trial court abuses its discretion when its outcome falls outside the reasonable and principled range of outcomes.[5]

B. LEGAL STANDARDS

"A criminal defendant is entitled to have a properly instructed jury consider the evidence against him."[6] The jury instructions "must include all elements of the crime charged, and must not exclude from jury consideration material issues, defenses or theories if there is evidence to support them."[7] A defendant is entitled to a jury instruction if he or she requests an instruction on a theory or defense that is supported by the evidence.[8]

C. APPLYING THE STANDARDS

1. INVOLUNTARY MANSLAUGHTER INSTRUCTION

McClinton contends that the trial court erred by failing to instruct the jury on the offense of involuntary manslaughter because it was supported by a rational view of the evidence. We disagree.

The difference between murder and manslaughter is the element of malice.[9] The crime of involuntary manslaughter includes "the unintentional killing of another, *without malice*, during the commission of an unlawful act not amounting to a felony and not naturally tending to cause great bodily harm . . ."[10] A defendant charged with murder is entitled to an instruction on the offense of involuntary manslaughter if such an instruction is "supported by a rational view of the evidence."[11] "[D]etermining whether a rational view of the evidence may support a manslaughter conviction requires considering whether a rational jury could conclude that the defendant did not act with malice . . . ."[12] Malice may be implied from the circumstances of a

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[4] *People v McKinney*, 258 Mich App 157, 163; 670 NW2d 254 (2003).

[5] *People v Babcock*, 469 Mich 247, 269; 666 NW2d 231 (2003).

[6] *People v Riddle*, 467 Mich 116, 124; 649 NW2d 30 (2002); MCL 768.29.

[7] *People v Reed*¸ 393 Mich 342, 349-350; 224 NW2d 867 (1975). See *McKinney*, 258 Mich App at 162-163.

[8] *Riddle*, 467 Mich at 124.

[9] *People v Mendoza*, 468 Mich 527, 540; 664 NW2d 685 (2003).

[10] *Id*. at 536 (emphasis supplied).

[11] *Id*. at 541.

[12] *People v Holtschlag*, 471 Mich 1, 16 n 8; 684 NW2d 730 (2004).

death, and includes (1) the intent to kill, (2) the intent to cause great bodily harm, and (3) the wanting and willful disregard of a tendency to cause death or great bodily harm.[13]

In *People v McMullan*, this Court held a rational view of the evidence in that case did not support an instruction on involuntary manslaughter.[14] In *McMullan*, the defendant was angry at the victim and had a fistfight with him in a parking lot.[15] After the fight ended, the victim got into his car.[16] The defendant grabbed a gun, went to the victim's car, prevented the victim from leaving the car, and then shot the victim at close range in the chest.[17]

This Court concluded that the facts in the case did not support an instruction on involuntary manslaughter.[18] This Court reasoned the defendant's continuance of the fight, his maintenance of a dominant position over the victim, and his act of pulling the trigger of the gun all indicated that the defendant acted maliciously.[19]

We conclude that, as in *McMullan*, a rational view of the evidence in this case does not support McClinton's claims that his actions were not malicious. Here, the witnesses testified that Sams was clearly unconscious after he fell. According to Vasquez and Gibson, McClinton paused a couple of seconds, then stepped forward, stood over McClinton's head, and hit him four or five additional times. McClinton's maintenance of a dominant position over Sams, his pause, and his decision to land additional blows on Sams's head while he was unconscious indicate that McClinton acted with *at least* a willful and wanton disregard of the likelihood that his actions would cause death or great bodily harm. We conclude that the trial court's decision not to instruct the jury on involuntary manslaughter did not fall outside the range of reasonable and principled outcomes.

2. DEFENSE OF ACCIDENT INSTRUCTION

McClinton contends that the trial court erred by failing to instruct the jury on the defense of accident. We disagree.

McClinton asserts that the trial court should have instructed the jury consistent with CJI2d 7.1, which provides the following:

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[13] *People v McMullan*, 284 Mich App 149, 152; 771 NW2d 810 (2009).

[14] *Id*. at 152.

[15] *Id*. at 153.

[16] *Id*.

[17] *Id*.

[18] *Id*. at 152.

[19] *Id*. at 153.

> (1) The defendant says that [he/she] is not guilty of ____ because ____'s death was accidental. That is, the defendant says that ____ died because *[describe outside force; e.g., "the gun went off as it hit the wall"]*.
>
> (2) If the defendant did not mean to [pull the trigger/(state other action)] then [he/she] is not guilty of murder. The prosecutor must prove beyond a reasonable doubt that the defendant meant to ____.

The use note to CJI2d 7.1 provides that the "instruction is designed for use where the defendant alleges that the act itself was entirely accidental." We recognize that neither the instruction nor the use note are legal authority, but we consider them here for their persuasive value and to provide context to McClinton's assertions.[20]

Here, as described above, McClinton invited Sams to fight, and then continued to strike Sams in the head after he was clearly unconscious. Because there was no evidence that McClinton did not intend the *action* of striking Sams, we conclude that the trial court did not abuse its discretion in declining to instruct the jury consistent with CJI2d 7.1, which concerns unintentional *actions*.

Further, to the extent that McClinton contends that he did not intend the *consequences* of his actions—that is, that he did not intend Sams's death—we note that CJI2d 7.2, not CJI2d 7.1, is the instruction that concerns the defense of accident when a defendant commits a voluntary act but did not intend the consequences. The trial court also did not instruct the jury regarding CJI2d 7.2. However, the trial court did instruct the jury that, in order to find McClinton guilty of second degree murder, it must find that he intended to kill Sams. Thus, the trial court fairly informed the jury that it could not find McClinton guilty if it accepted his assertion that he did not intend Sams's death. We conclude that the trial court did not err by declining to instruct the jury on the defense of accident.

3. MISSING WITNESS INSTRUCTION

McClinton contends that the trial court erred by failing to instruct the jury that Freeman's testimony would have been unfavorable to the prosecutor. We disagree.

A prosecutor who endorses a witness must use due diligence to produce that witness at trial.[21] If the prosecution fails to assist the defendant in locating and serving a witness, the defendant may be entitled to a missing witness instruction.[22] The instruction allows a fact-finder

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[20] See *People v Petrella*, 424 Mich 221, 277; 380 NW2d 11 (1985).

[21] *People v Eccles*, 260 Mich App 379, 388; 677 NW2d 76 (2004).

[22] *People v Perez*, 469 Mich 415, 420; 670 NW2d 655 (2003).

to infer that the prosecutor's failure to produce the witness means that the witness would have presented testimony that would harm the prosecutor's case.[23]

We conclude that the trial court did not err when it determined that the prosecutor diligently attempted to product Freeman at trial. "Due diligence is the attempt to do everything reasonable, not everything possible . . . ."[24]

Here, the prosecutor made numerous efforts, spanning several weeks leading up to trial. The prosecutor made many attempts to call Freeman and many attempts to serve her with a subpoena, but he was unable to locate her. After the prosecutor's initial attempts failed, the prosecutor solicited the help of the police department's internal investigator, police cadets, and members of the Battle Creek Gang Suppression Unit, all of whom were unable to locate Freeman. The prosecutor checked Freeman's last known address, contacted her known relatives, and used computer bases to try to locate her, but the efforts were unsuccessful. We conclude that the trial court did not err when it determined that the prosecutor diligently attempted to produce Freeman at trial. Thus, McClinton was not entitled to a missing witness instruction, and the trial court did not err by refusing to issue one.

Finally, to the extent that McClinton asserts that the trial court should have held a hearing to determine whether the prosecutor acted with due diligence. MCL 767.40a no longer requires the trial court to conduct an evidentiary hearing simply because the prosecutor failed to produce a witness.[25] Thus, McClinton was not entitled to an evidentiary hearing.

III. CONCLUSION

We conclude that the trial court did not abuse its discretion by declining to instruct the jury on the offense of involuntary manslaughter or the defense of accident because a rational view of the evidence in this case did not support either instruction. We also conclude that the trial court did not err by declining to instruct the jury that the testimony of Freeman, a missing witness, would have been unfavorable to the prosecutor because the prosecutor diligently attempted to produce Freeman at trial.

We affirm.

/s/ William C. Whitbeck
/s/ Kurtis T. Wilder
/s/ Amy Ronayne Krause

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[23] *Eccles*, 260 Mich App at 388.

[24] *People v Cummings*, 171 Mich App 577, 585; 430 NW2d 790 (1988)(quotation marks and citation omitted).

[25] *People v Cook*, 266 Mich App 290, 295-296; 702 NW2d 613 (2005).